A GENERAL ANALYSIS OF TORT-RELATIONS.

IN a former article in this Review,[1] an attempt was made by the writer to set forth briefly the tripartite division of the tort-relation, as embodying the prime elements in every so-called tort. This analysis distinguished: *first*, the Damage element, *i. e.* the various kinds of harm, corporal, social, proprietary, and other, which the law recognizes as the subject of a recovery; *secondly*, the Responsibility element, *i. e.* the principles which determine whether, under given circumstances, a particular person is to be held responsible for the infliction of one of these kinds of legal harm; and *thirdly*, the Excuse or Justification element, *i. e.* the conditions in which no legal liability is recognized, even though there may exist a conceded or assumed responsibility for a conceded or assumed harm. With a reference to that article for an exposition of this general grouping, a further attempt will here be made to analyze the different groupings within these broad divisions, and to illustrate and test their validity by noting the appropriate place of the detailed and concrete sub-topics.

It must be said in advance: 1. That there is no intention of indicating the solution of any doubtful problems, or of assuming the correctness of any view of what the particular rule is or ought to be; the aim is merely that of marking out the field: 2. That the analysis is necessarily rough and often tentative only, and space often compels a disregard of minor qualifications: 3. That, as to method, the fundamental idea is, not to follow fancy nor to force a symmetrical grouping, but, neglecting accidents of appearance and surface differences, to examine reasons and causes, to ascertain the intrinsic meaning of principles and the considerations actually treated as controlling decisions, and thus at once to reach a scientific and natural basis of grouping, as well as to indicate the true lines of argument and discussion on which the development of principles must proceed.

We take first the Damage element.

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[1] Vol. viii. p. 200.

I.

The general question here is, What are the features of the various kinds of harm which give rise to different problems, and therefore point out different lines of division? In this field of Tort, we have, of course, a number of different harms well recognized and defined. The juristic problems of to-day (excluding mere detailed applications of accepted principles) are here chiefly to determine the scope of particular well-established harms so as to develop them in accordance with to-day's conditions, and to indicate the proper analogies to be employed in ruling upon newly offered varieties of harm. Of the former, an illustration is found in the claim by a wife for the seduction of a husband; of the latter, in claims based on the so-called right of privacy. In attempting to group the topics, therefore, we should set together those varieties of harm with reference to which the same or similar doubts and difficulties arise, and the same or similar policies may come into consideration.

Taking up first the harms which concern the person, and, among these, physical injuries — being those which may be regarded as jurally the most fundamental and historically the earliest and gravest, —

1. We find among these at the outset that so-called "technical" battery, having a traditional origin but still a living justification for existence, — a mere touching. This is one example of what may perhaps be uncouthly termed "prophylactic" rights. In these it is conceded that no demonstrable harm is done, and nominal compensation alone is allowed, but yet on grounds of policy we desire to protect stringently by a kind of outpost-right; we therefore (as in battery, in trespass generally, in libel and partly in slander, in statutory patent-right, copyright, and trademark-right) make specific conduct actionable because (perhaps) we believe it to be so commonly followed by substantial harm that it would be practically too burdensome to require in each case an investigation into the details of harm; we accordingly protect the claimant at the very threshold of an important personal or property interest. We may take it that the action for a mere touching is one which, for some such reasons, no one would to-day move to abolish. The only problems involved are as to the extent of the sphere of protection thus specially sanctioned — whether it includes the clothes, articles carried, animals driven or led, etc.

2. Next we may group veritable physical injuries, of whatever sort, — cuts, blows, disease, and the like. The controversies in this connection concern commonly the naturalness and probability of the harmful result with reference to the defendant's conduct, and belong therefore under the Responsibility heading below. The exact nature of the harm is often of consequence in connection with the measure of damages. Other than these, the most points are few. Of recent years, discussion has arisen as to claims based on nervous disorders, especially when caused without physical contact. The question is then usually, from the present point of view, whether the injury or suffering is a physical, not merely a mental one; and, if so, whether there is any reason why it should be denied the recovery which is granted for all other physical injuries. It is not always observed that there may be in this respect a distinction between (1) mere fright (a mental injury; see *post*) and (2) positive physical illness resulting from fright.

3. Next to physical injuries may be grouped those annoyances and offences to the senses which do not amount to illness or wounding, but yet are positive harms; they are covered in ordinary legal diction by the term "Nuisance." [1] Many affect merely a single sense — hearing, sight, or smell — but most are of a mixed character. They fall naturally together in treatment; *first*, because they often bring us to the border-land at which *de minimis non curat lex*, and they frequently call upon the judges for attempts to define the boundary in satisfactory terms; *secondly*, they are usually worth considering for those only who are continually exposed to them, *i. e.* the owners or occupiers of land; and hence there are certain questions common to all of them, in that *e. g.* some interest in land must usually be shown in order to base a claim, and it is commonly said that the harm is to be tested by its effect in depreciating the value of land or in rendering it uncomfortable to life. The claims seem at bottom, however, to be based on a personal harm.[2]

We come next, naturally, to "mental" injuries, so-called, the idea of which, as distinguished from physical injuries, is that they are

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[1] So far as a distinct health-injury is covered by this term, it belongs in theory in the preceding class.

[2] Certainly there are numerous cases where the claim is recognized independently of any property-right in the claimant. One of the best recent examples is the action allowed in England against a newsboy for offensive noise in crying his papers (Innes *v.* Newman, L. R. '94, 2 Q. B. 292), though a municipal regulation was there involved.

subjective, and do not involve any corporal affection. A general and uniting feature is the constant necessity of guarding against the recognition of imaginary or trifling troubles, or of claims likely to be based on misrepresentation or individual idiosyncrasies. Several distinct groups, however, may be noted.

4. First, terror or fright at impending physical violence has long been recognized in the action for Assault (anciently "Menace"), which calls for a number of detailed distinctions. As yet an action for fright indirectly caused — as in a collision or by blasting — cannot be said to be recognized; though, so far as the legitimacy of the Damage element is concerned, the analogies favor it.

5. Another distinct sort of mental injury has also lately been much discussed, under the head of the "right to privacy." This seems to be in essence a right to be protected against that mental annoyance of a complex sort which results from the exposure of private affairs; and, though specific prevention is the remedy commonly desired, it seems likely that damages would be based on the above idea of the nature of the injury. Its delimitation has not yet been successfully effected, and cannot be for some time. A careful consideration of the distinction between the Damage element and the Excuse element would probably assist its orderly development.

6. A third group includes the miscellaneous forms of injury termed loosely "mental pain" or "mental anguish," — feelings of distress caused by libel, seduction of a daughter, alienation of marital affections, eviction from a house or a railway car, violation of a grave, failure to deliver a telegram, and by other conduct. The usual question, forming a common feature, is whether they should be recognized at all as the basis of a claim. A principle often applied is that there must be an accompanying physical injury, or perhaps some other admitted tort. Very often the only question is one of Responsibility, *i. e.* whether the harm was the natural consequence of the defendant's act. The telegram cases probably all belong under Contracts. Most of the above instances are treated as a part of the law of Damages; but a careful analysis shows us that a part of that branch of the law involves, not the mere measure of compensation for an admitted harm, but a determination whether a particular harm can be recognized at all as the basis of a claim; and this is properly a question of torts, so far as it involves not a contractual but a universal and irrecusable obligation.

Coming now to the societary rights (rights to social relations) in general, we find as the generic feature a right to be protected against the stoppage or diversion of benefits of various sorts to be gained from social and commercial relations with third persons. In this field there is as yet no accepted grouping, and it is, indeed, in connection with the Excuse element that the circumstances giving rise to the proper distinctions are suggested to us. A rough grouping of the relations may be made into (1) Domestic, (2) Contractual, and (3) Sundry Voluntary relations. The question here is, What sorts of relations may become the subject of a right against interference? Taking first the general class last mentioned, we find that there is a broad distinction between (*a*) the diversion of patronage by the reproduction of private literary and industrial inventions, and (*b*) the diversion of patronage by any other means. The latter it will be better to look at first.

7. The commonest questions that strictly belong here are two: (1) whether the relation in issue is the subject of a claim (it is said *e. g.* that it must be the source of some pecuniary or other material benefit)[1]; (2) whether the relation is the source of a benefit sufficiently constant or certain to be worth considering.[2] But we find under the Excuse element that certain kinds of interference, *e. g.* peaceable individual suasion, are concededly exempt from recovery, and that certain other kinds, *e. g.* defamatory or fraudulent interference, are concededly unexcused and actionable; and accordingly, for the better protection of the latter sort of right, certain additional "prophylactic" rights have been sanctioned; these we now come to. (3) Written defamation ("calculated to bring the plaintiff into hatred, ridicule, or contempt") and oral defamation (imputing a crime, a loathsome contagious disease, or a professional incapacity) are *ipso facto* and apart from actual damage protected against; for such conduct is regarded as almost inevitably bringing social harm, positive but more or less difficult to prove, and therefore worth forbidding at the threshold.[3] Of the whole law of libel and

[1] *E. g.* Davies *v.* Solomon, L. R. 9 Q. B. 112, where the loss of hospitality of friends was regarded as a sufficiently substantial harm.

[2] *E. g.* Dudley *v.* Briggs, 141 Mass. 582, where the single issue of a directory was held not to show sufficiently the existence of a good-will or market alleged to have been destroyed by the defendant.

[3] The cases on damages show that this right is intended to protect, not merely against social ostracism, but also against the feelings of shame and humiliation which also follow the publication of such false charges. It is this element of mental suffering which points to the present right as occupying the transition place between corporal and societary rights.

slander, we are of course here concerned only with that part which deals with the nature of the unlawful utterances and the fact of publication; other portions belong under the heads of Responsibility and Excuse. (4) The diversion of patronage by substitution of merchandise, etc., fraudulently represented as the plaintiff's (one of the unjustified forms of interference already mentioned) is also given special "prophylactic" protection, though this has come by statute, not by common law; by the registration of trademarks under statutory regulations an additional and stronger right is given. It is distinctly "prophylactic" in that the registered owner of the trademark-right does not base his claim upon a specific diversion of patronage; as in libel and in words slanderous *per se*, his right is against certain conduct, apart from actual harm done, — in this case, the right not to have the trademark used, whether or not a specific customer has been lost.[1]

8. The other sort of right just mentioned (under Sundry Voluntary relations) is the right against diversion of patronage by the reproduction of one's private inventions, literary and industrial, — the so-called common-law copyright and the right to trade-secrets. General convenience, however, demands that after publication to the community they shall cease. Yet here again, a "prophylactic" right has by statute been established on condition of registration according to certain regulations which make it possible to identify and authenticate one's creations, as it would not be without some such facilities; this absence of registrationary authentication probably justifies the common-law refusal to recognize the right of copy and of trade-secrets (they are analogous to patents) after publication.[2] The statutory right of patent and of copy is dis-

[1] Browne on Trademarks, §§ 468, 501 (the damage is said to be "presumed").

[2] Space does not suffice for detailed exposition of this analysis; but this much must be said: —

(*a*) The right to trade-secrets is sometimes placed on the ground of breach of confidence, *i. e.* a contractual duty. But the right would exist against one who had stolen a trade-secret as well as against the stealer of a manuscript lecture; and the former right seems to be genuinely a common-law patent-right, on the same footing as common-law copyright. (*b*) The right of privacy and the common-law copyright must be strictly distinguished. In such cases as Mr. Gilbert's suit against the "London Star" for giving out in advance the libretto of his new opera, and Miss Harriet Monroe's suit against the "New York World" for premature publication of the World's Fair Ode, the right of privacy is in no way involved. The purpose in such cases is to prevent the diversion of profits or injuring of the market available for the author's work; the author intends to publish in good time, and has a right to all the profits then to be secured. But in the genuine right of privacy the complainant is seeking not to conserve profits, but to prevent publication of that which he wishes to keep permanently private; the injury anticipated is not to his pocket but to his feelings.

tinctly a "prophylactic" one, because the registered owner need show no specific harm, *i. e.* his right is against the mere making for use, whether or not he can show the actual loss of a customer.[1]

9. Taking next the Domestic relations, and inquiring what relations and what kinds of benefits from them are recognized as the subject of a claim, we find in general that the filial, parental, and marital relations are thus recognized, with of course certain historical exceptions; that the loss of material benefits (support, services) is in the main the legal harm; and that the loss of affection, etc., is in part also recognized. The nature of the action for seduction is here involved. Modern statutes supplying defects of the common-law ("death by wrongful act") are to be considered, — in particular the difference between (1) statutes vesting recovery in those who have lost support, (2) statutes vesting recovery in relatives merely as such, and (3) statutes merely causing the deceased person's claim for corporal injury to survive.

10. Under Contractual relations no question arises as to their recognition; this is conceded. The question, What modes of interference are excusable and what are not? is one of Excuse.

11. In addition to the above sorts of harm to societary relations (7, 8, 9, 10; generalized in the paragraph preceding 7), the right is to have the benefit of certain relations preserved, not destroyed or diverted. But there is also a right of very limited application, which may be phrased as a right to have a burdensome relation not enlarged, not made more burdensome; the claim is based, not on the social benefits that would otherwise have come to us, but on the social burden that would otherwise not have come to us. The ordinary instance is that of medical expenses incurred in caring for an injured child or wife. Other instances, not yet judicially recognized, are found in Anthony *v.* Slade,[2] where a pauper whom the plaintiff was bound to support was beaten by the defendant, so that the plaintiff incurred additional expense in caring for him; and in Midland Ins. Co. *v.* Smith,[3] where an insurance company by the defendant's incendiary act was obliged to pay out insurance money which it might never have had to pay. It seems proper to distinguish this group from the preceding ones, because the considerations of Responsibility and Excuse may here be different.

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[1] Robinson on Patents, §§ 898, 903; Drone on Copyright, pp. 521, 633.

[2] 11 Metc. 290.

[3] 6 Q. B. D. 565; also Simpson *v.* Burrell, 3 App. Cas. 289; Ins. Co. *v.* Brame, 95 U. S. 758. See also Dale *v.* Grant, 34 N. J. L. 142.

We pass now to the Proprietary ("property") rights. The field to be covered is a limited one; the largest part of property law being concerned with the subdivisions of rights and with the creation, transfer, and extinction of rights. A simple and workable line of division seems as follows: Conceive an object of property to be owned in fee simple, in severalty, unaffected by trust, mortgage, or easement; then the determination of the scope of this right, the statement of the harms against which it is the essence of the right of property to give protection, will properly fall under Torts; the description of the various subdivisions, such as estates, easements, mortgages, trusts, and joint titles, as well as the modes of creation, transfer, and extinction of the general property-right and of its different subdivisions, may be dealt with as distinctively Property law.

The grouping of the objects of the property right, then, for the purposes of Torts, seems to involve three kinds: (1) fixed, including land (with plantations and houses), stationary water, and aerial space; (2) detached, including portable things; (3) fluent, or accedant, including three sorts now to be mentioned. This grouping rests on similarities of policy within each group, and not on superficial resemblances.

12. The last class may be looked at now, from its analogies to the societary rights. There are three kinds: (*a*) There is a right to such benefit as may come by the resort of wild animals to our land, as game to be caught or shot, as furnishing eggs or other useful products, etc.; the right is to have them resort free from interference by the defendant, except so far as allowed by the limitations of the Excuse element.[1] (*b*) There is a right to have flowing water of certain sorts come to our land in its normal quantity and quality, a right that it shall arrive free from interference by the defendant, except so far as allowed by the limitations of the Excuse element (reasonable use, etc.).[2] (*c*) There is a right to have the effects of transmitted electrical force produced in and upon our premises, a right that the effects of means set in operation to that end shall freely be produced, except, as before, so far as

[1] Keeble *v.* Hickeringill, 11 East, 574, *note;* 11 Mod. 74, 130.

[2] "He has the right to have it come to him in its natural state," etc. Lord Wensleydale, in Chasemore *v.* Richards, 7 H. L. C. 382. Since there is no property in the water itself before or after its passage through the plaintiff's land, the analogy to the case of wild animals seems the strongest. "Easement" seems inaccurate, for easements are partial or limited rights, and nobody has for running water any greater right than the one we now are considering.

allowed by the limitations of the Excuse element (reasonable competition).[1] The justification for grouping these three sorts together is found as well in the analogous nature of the object of the right as in the striking similarity of the appropriate Excuse limitations, — limitations very different from those allowed for interference with fixed and detached property, and decidedly analogous to those for interference with social relations.

13. The general nature of the other property rights (fixed and detached) seems to be a right that the thing shall not be (1) impaired, or (2) intruded upon or disseised. To this seem reducible the principles of the actions for trespass, conversion, and disseisin. It is neither necessary nor possible to go further here into the nature of the forbidden harms, the topics to be included being sufficiently clear. It must be noted, however, that there is recognized here also (as in trespass to the person) a "prophylactic" right, viz., a right against a mere touching or intrusion, apart from the infliction of actual harm.

We have now surveyed the different sorts of harm as to which every person is entitled to be protected as against every other person. We come now to the element of Responsibility, as already defined, *i. e.* the principles determining whether a given person is to be held responsible for an assumed or conceded harm.

II.

The legal material involving the Responsibility element is much larger than that of the element just considered; but it is covered by a few broad principles. These raise many difficult and delicate problems in their application, as must often be the case when a simple principle is brought directly to bear upon a complex situation involving fairness of conduct; but these difficulties are rather for the practical judgment of the tribunal than for jurisprudence.

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[1] One is perhaps apt to suppose the analogy to the diversion of running water an exact one, as if the defendant tapped a flow of electricity towards the plaintiff's premises. This, however, would be erroneous. It is, of course, not that an electrical "current" flows along the wire. All we can say, perhaps, is that earth and atmosphere are constantly in an electrical condition, potential in effects; that the wire or other apparatus directs and concentrates these effects; and that the interfering person, by providing adjacent wires or other apparatus, counteracts the influence of the plaintiff's apparatus and causes the desired effects not to be produced. This seems to justify the above mode of expression, and is at the same time broadly analogous to the case of running water.

The general idea of Responsibility seems to involve in Anglo-American law three main notions: —

1. *Causation.* We find, first, a fundamental notion that the defendant must have *caused* the harm in question. This is to-day almost axiomatic; although in primitive and mediæval times many kinds of connection, short of causation, sufficed to fix liability. The superstitious attitude of the period made accursed the man and the thing by whom the offence came, whether in strictness it was or was not caused thereby.[1] The accepted ethical axiom of to-day, causation, rarely gives rise to legal difficulty in its application, except in one or two cases commonly treated under the law of Damages, *e. g.* whether a particular disease was caused by a carrier's negligence or by a surgeon's bungling, whether a loss of business profits was caused by alleged unlawful conduct or by external events, etc. A special problem is presented where several wrong-doers have co-operated and the apportionment of Responsibility to the real source is necessary; as where dogs of several persons combine in worrying sheep. Usually the knot is cut in Alexandrine fashion; as where the liquor-damage statutes provide that, during the period of disability of a father by intoxication to support his family, any liquor-seller furnishing liquor during that time shall be liable; or where the common-law principle makes any one of joint tort-feasors liable for the whole damage.

2. *Activity.* Next we find a cardinal principle (not without exceptions) requiring that the person to be made responsible must be fixed with an initiating act or activity, an exercise of volition, remote or near, without which he cannot be brought to bar. This is the broader phase of the well-known principle that an action of tort does not lie for a mere nonfeasance. All the harm in the world may come to X, but Y cannot be made responsible unless we can fix upon him some active interposition.[2] Thus, one who,

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[1] See the article in 7 HARV. LAW REV. 315 ff.

[2] It is a common error to suppose that "negligence," as the source of culpability, involves often or usually a mere omission, a not-doing as distinguished from positive doing in a careless way. But all negligence, in Torts, is founded ultimately on a doing an action. If the source is in appearance an omission, as where an engineer fails to ring the bell or to keep a lookout, it is reducible to a mismanagement, an improper doing. Speaking accurately, the term "negligence" expresses merely the relation between this original act and the harmful consequence, *i. e.* the probability of the harm; and therefore the culpability consists in putting one's hand to the deed (thus always an Action) in the face of this probability of harm. Mr. Justice Holmes has pointed this out long ago (Common Law, pp. 152, 161): "In all these cases it will be found that there has been a voluntary act on the part of the person to be charged. . . . It is

as in Bentham's well-known illustration, sees a man drowning and with power to save him fails to do so, or, as in the Roman Law glosses, sees an absent neighbor's windows open and perceives without preventing the deluge of the exposed rooms by a rain-storm, may stand idle and laugh with civil impunity at the harm which ensues. So also, one who is unwillingly carried upon another's land is not guilty of a trespass. We may or may not quarrel with this morality, but the notion is now a racial feature of our legal system. The application of it gives rise to little dispute, but there are one or two exceptions of policy which are to be noted. (1) The possession or ownership of real property often fixes a responsibility for harm where not a hand has been lifted by the defendant; thus, one who acquires land on which is a noisome pond or a tottering building may become responsible for harm caused thereby. Incidentally the distinction between owner and occupier may come into play. So also statutes fix civil responsibility upon municipal corporations for defective ways, etc., and statutes sometimes make the owners of buildings liable for disability caused by the sale of intoxicating liquors therein, though no active initiation can be brought home to the defendant. (2) There is perhaps a disposition to put a criminal responsibility upon those who by nonfeasance allow others to suffer bodily harm, where the circumstances place the defendant in a peculiar relation, — as where a brother allows a sister in the same house to starve.[1] But whether a civil responsibility should be imposed is not yet answered in the affirmative.

3. But one is not made responsible even for every harm actively caused by him. To quote Mr. Justice Holmes again: —

"If running down a man is a trespass when the accident can be referred to the act of spurring, why is it not a tort in every case, as was argued in Vincent *v.* Stinehaur, seeing that it can always be referred more remotely to his act of mounting and taking the horse out? The reason is that if the intervening events are such that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so. . . . If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical consequences ending in damage. The requirement of an act is the requirement that the defendant should have made a choice. But the only

necessary that he should have chosen the conduct which led to the harm. . . . The philosophical analysis of every wrong begins by determining what the defendant has actually chosen, that is to say, what his voluntary act or conduct has been."

[1] R. *v.* Instan, L. R. '93, 1 Q. B. 450.

possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability, . . . to give a man a fair chance to avoid doing the harm before he is held responsible for it. . . . Accordingly it would be possible to state all cases of negligence in terms of imputed or presumed foresight." [1]

The phrasing and the application of this third element give rise to the greater part of litigation in this field. The general question is, Where shall the line be drawn to express that relation between the defendant's conduct and the harmful consequence which fairness and policy regard as completing civil responsibility? Observe that it is a question of a *relation*. From the defendant's point of view, we are apt to speak of his "negligence;" from the standpoint of the harm done, we are apt to speak of a "natural" or "probable" consequence. But both of these terms, properly understood, are relative; at whichever standpoint we take, the harm must be viewed with reference to the conduct, and the conduct with reference to the harm. The further grouping of classes of cases under this head, with reference to the help to be gained by treating similar questions together, is an interesting subject, but one for which space does not here suffice.

4. (*a*) The general principle of the preceding paragraph (3) — which we may call *Normality*, a term expressing the leading idea common to "natural," "probable," "ordinary," and the other words — suffers an important variation in a large group of cases, in which the defendant is said to act at his peril. Here it is no longer left as an open question for the jury whether the harm in question was the "natural and probable" or normal consequence of the defendant's conduct. The courts may declare once for all that certain harms are always to be regarded under certain circumstances as the normally apprehendible consequences of certain conduct; hence, given the conduct and the consequence, and the defendant is responsible without further inquiry. This is therefore, after all, not so much a variation from the principle of Normality as a permanent reduction of the general principle to specific rules for specific cases. As Mr. Justice Holmes puts it: —

"There are also many cases in which the teaching of experience has been formulated in specific rules. . . . There is no longer any need to refer to the prudent man or general experience. The facts have taught their

[1] Common Law, pp. 92, 95, 144, 147.

lesson, and have generated a concrete and external rule of liability. He who snaps a cap upon a gun pointed in the direction of another person known by him to be present is answerable for the consequences." [1]

First, in grouping these rules, we find a number of miscellaneous cases determined by the courts from time to time. With reference to certain harms, the keeping of dogs, cattle, and other animals, the storing of explosives, the use of weapons, and other sorts of conduct, have been declared to be to some extent governed by this test. But the important thing to notice is that such rules *may* be formulated for responsibility for every kind of legal harm. In trespass and conversion, the question whether we walk on land and deal as owners with personalty at our peril; in libel, the question how far, with reference to inadvertent publication, we put defamatory statements on paper at our peril; in loss of service, the question how far we employ another at peril, with reference to a possible existing contract of his, — for all the different kinds of harm the question may come up. These germane questions all throw light upon one another, and their consideration in one place helps us to discuss intelligently the comparative policies of different situations. *Secondly*, we have a principle of limited application that "unlawful" acts — signifying an illegality, usually statutory, independent of the question at issue — are done at peril. The application of this principle is attended with a looseness and a confusion with which we need not here try to deal. (*b*) In numerous cases, also, courts are found ruling that on the facts of case the defendant is guilty of negligence as a matter of law. The difference between this and the preceding form of the principle seems merely to be that the court lays down no general rule for a class of cases, and does not intend to go beyond the complex of facts then before it. But the two forms shade off into each other at a point almost indistinguishable.

This sub-principle of "acting at peril," it must be added, has certain general limitations; and a special group of cases attempt to determine how far extraordinary catastrophes or the acts of third persons relieve from responsibility one who would ordinarily be "acting at peril."

Within these four headings it seems that all genuine questions of Responsibility are included.

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[1] Common Law, pp. 150, 152.

III.

In the Excuse or Justification element, a general agreement as to the inter-groupings of the various topics has not yet been reached — has indeed been little canvassed. The idea of the following attempt is to ignore superficial resemblances, and to take as the basis of grouping the essential policy of the excuse, — that which gives it character, and explains its varying application by the courts.

To begin with, then, we find three broad groupings. (*a*) We notice that in one group the excuse finds its reason solely in the condition, conduct, or other circumstances of the plaintiff, the one suffering the harm. Excuses resting on the consent, the contributory fault, the illegal conduct, the need of assistance, of the plaintiff are thus characterized, and are governed by considerations more or less associated. (*b*) At the other extreme, we find certain excuses starting from the interest of others than the plaintiff. These include the excuses resting on the needs of public justice, and the excuses resting on the interests of the community in general or of the defendant in particular, defining the limits of competition for commercial profit, the extent of injury by nuisances, etc. The general problem is to determine how far such opposing interests justify the harm done to a plaintiff himself innocent of fault. (*c*) Intermediate, lies a class in which both these elements enter, — being in the main the various limitations called for by the requirements of self-defence and self-redress. Here we find the former element, in that the plaintiff is supposed to be in some way to blame; while the latter element is also present, in that the defendant has by hypothesis some interest of his own to protect; the general problem being in effect to determine the total effect to be given to these considerations.

A. 1. Taking the first general group, we find that Consent (Leave and License) is generally recognized as limiting the right and taking away the claim for harm done. There are, of course, a few exceptions to be marked.

2. Next to a direct consent of the plaintiff to bear a specific harm, we may place that conduct which, in several more or less distinct forms, amounts to the Assumption of a Risk of harm. The three leading varieties are: (*a*) the wilful rushing upon harm, — chiefly the doctrine of avoidable damage, — Contributory Wilfulness, it may perhaps be termed; (*b*) Contributory

Illegality, — as, in certain cases, the violation of a statute; (*c*) the attitude of one who as a trespasser, or licensee, or employee, may fairly be regarded as assuming certain risks on the premises of others; (*d*) negligent conduct, almost equivalent in effect to some of these, but less pronounced, — the doctrine of Contributory Negligence. In all of these the effect of the plaintiff's attitude as an Excuse for the defendant is seen to be less pronounced, for it usually does not cover harms inflicted with a certain degree of deliberateness or wantonness. Hence a kind of balancing of the conduct of the parties is in all four often called for, — as in the doctrine of "proximate cause" under Contributory Negligence, or in the failure to excuse, even as against a trespasser, one who "sets traps" for him.[1]

3. Finally, a condition of the plaintiff calling for humane assistance is a circumstance leading to a limitation. Trespassing to save the plaintiff's property or life is said to be in certain cases excusable by "implied license;" but this seems a mere fiction. A sense of the unfairness of the plaintiff's attitude in seeking redress, and the adjustment of this idea to the countervailing considerations — the relative harm done and prevented by the defendant, the possibilities of abuse of privilege, etc. — are the real motives supporting the few rules that we have for this topic.

B. Taking next the intermediate group of limitations (lettered *c* above), we find that, with one exception, it is made up of the various forms of Self-redress and Self-defence.

1. To get the benefit lying in the comparison of related situations and the transition from one aspect of policy to the next, the topics may be considered in this order: (1) Defence of one's own person; (2) Defence of another's person; (3) Defence of personalty; recaption of personalty; (4) Defence of realty; repossession of realty; (5) Abatement of a nuisance. Different policies may conceivably prevail for the defence of different interests, and different limitations may obtain according as the object is defence or recaption. Furthermore, within each topic we may consider in order what sort of harms — *e.g.* a battery, an imprisonment, a

[1] The generic feature of the principle of Contributory Fault or Assumption of Risk is seen in that the question may arise in excuse for other harms than a corporal injury, — as where one by his own conduct precludes himself from suing for the seduction of his daughter or the alienation of his wife's affection, or where the author of an immoral book claims protection, or where mutual unbridled recrimination in a neighbors' quarrel prevents either from recovering against the other.

trespass to property, etc. — may be inflicted for defending the particular kind of interest in hand; for the law may well license one and stop at another. By such a grouping, it would seem, an opportunity is gained for distinguishing and comparing various shades of policy and detecting their effect, if any, in the concrete rules.

2. Akin to the preceding topics, in that there is involved on the one hand some blame in the plaintiff, and on the other some legitimate interest of the defendant's to be protected, is the subject of Discipline and Correction, — the limitations allowable in favor of parents, teachers, masters, ship-captains, and the like. The arrest and imprisonment of an admitted wrong-doer belongs theoretically here.

C. We come now to the group of excuses which rest upon the needs and interests of others than the plaintiff, — whether of the defendant or of another or of the community in general. We find here a tendency to be chary with excuses where the interests of one person alone, particularly the defendant, are urged, and to be liberal where the community at large is concerned. For a first grouping, a distinct separation can be made of those limitations which rest specially upon the needs of the administration of justice; the remainder form a second group.

1. The *requirements of the administration of justice* offer room for conceivable differences of policy according as the person who is responsible for the harm is (*a*) a party litigant claiming the enforcement of a right, (*b*) an officer of justice, or a person acting as such, proceeding in the interests of justice. (*a*) Here we discuss the limitations available in excuse for an arrest, attachment, or other legal proceeding causing harm to an innocent plaintiff, and usually treated under the action for malicious prosecution, attachment, etc. When we have here a conceded harm and a conceded responsibility, it seems clear that the remaining question is as to the proper limitations — reasonable cause, etc. — within which one may with impunity inflict such harm while claiming to enforce his rights. (*b*) The policies here involved lead us to a further grouping according to the injuries committed. (1) Where an injury to person or to property is involved (arrest, attachment, etc.), there are first to be considered the limitations in favor of one arresting (with and without a warrant),[1] or attaching, including the protection allowable

[1] Under this head we treat also of private persons making arrests, because the protection given them rests on the general requirements of justice, not on their private

under defective writs, and the doctrine of trespass *ab initio;* then the limitations in favor of a judicial officer, as to whom a policy of greater liberality may prevail, and as to sundry officials having authority of a mixed nature. (2) Where the injury involves a defamation, we have to consider the respective privileges of the judge, the pleader, the witness, and finally the reporter of the proceedings; for it would seem that the protection of "fair reports" rests peculiarly on the special needs of the administration of justice.

2. Coming now to the excuses resting on miscellaneous requirements of external interests, we again find the general problem to be the degree of consideration to be given to those interests weighed against the harm done to individual innocent plaintiffs, and the results naturally differing according to the kind of harm involved.

(*a*) Injury to property by trespass. Whether an intrusion is justifiable to avoid inconvenience or to save one's life; whether buildings or merchandise may be destroyed to stop a fire; — these examples indicate the sort of problem involved. The bearing of the admiralty principle of jettison is not always recognized. The question is not always kept separate from a distinct one, the quasi-contractual right to compensation for harm thus lawfully inflicted. (*b*) Nuisances. The extent to which one may with impunity annoy and injure another by nuisances of smoke, etc., depends on the proper limits to be allowed to the necessities of the community in industrial and other activities, as balanced against the respect due to individual convenience,— as the decisions show.

(*c*) Interference with game, with running water, with electricity. Here, again, the policy of regarding the reasonable requirements of others is applied in special sets of circumstances.

(*d*) Copyrights and patents. Here the interests of the community find consideration (apparently) in the time limitations which throw open the invention to the public after a period sufficient to repay authors and inventors and sufficiently stimulate creative effort.

(*e*) Defamation. Here the policy receives application in two leading doctrines: (1) Communications in the protection or vindication of a legitimate interest of an individual or of a special

interests of redress (for the law is the same whether the arresting citizen be the very one harmed by a theft, etc., or a third person); though to guard against abuse the limitations may well be, and are in part, stricter than for a commissioned officer.

body — certain statements about employees, reports to stockholders or to subscribers of a commercial agency, charges against a municipal officer, etc. — call for an adjustment of the limits allowable to such self-seeking efforts; the doctrine of malice is incidentally involved. (2) In the interests of the community at large, a certain freedom of criticism, not as liberal as in the preceding class of cases, is to be permitted in matters of literature, public behavior, etc.; a similar policy being involved.

(*f*) Injuries to societary relations. Mr. Justice HOLMES has lately shown[1] how the general question here is one of the proper limits allowable to the needs of industrial competition and of general social intercourse, with reference to the harm to individuals therein necessarily involved. The grouping, for this purpose, into (1) Domestic, (2) Contractual, and (3) Sundry Voluntary relations has already been explained. It is unnecessary here to suggest the different detailed problems that arise, except to call attention to the smaller degree of liberty allowed for interference with the more solid and definite relations of the first two classes as compared with the third. In the third class we find, on the whole, a general agreement, on the one hand, to make no allowances in favor of violent, fraudulent, or defamatory interference, and on the other, to exempt from action any peaceable individual suasion. Between these extremes the principles are as yet being worked out, the problem being to adjust the conflicting requirements of the general social needs and of individual security, and to define the place where the former shall not be allowed to override the latter.

It must be again noted that these different policies of Excuse, above rehearsed, may apply to any of the legally recognized harms. The doctrine of consent or of assumption of risk, the needs of the administration of justice, the requirements of social convenience, may or may not justify a trespass, a slander, a nuisance, a boycott. Not every form of Excuse, of course, is applicable to each kind of legal harm; but each form of policy exists for itself and not in yoke with a specific kind of harm, though its result, when applied to different harms, may not be the same. This seems to show that the natural line of cleavage is a horizontal rather than a vertical one, that the general grouping should be not *e. g.* (1) Battery, (2) Responsibility for it, (3) Excuses for it, and so on for other kinds of harm, but rather (1) Harm in general, the varieties; (2) Responsi-

[1] 8 HARV. LAW REV., pp. 1–14.

bility in general, its elements; (3) Excuse in general, the varieties. This is the fundamental proposition of which this article is intended to be an exposition. The unity in variety of policies and principles according to the latter grouping seems to indicate it as the fruitful one, — from the point of view of the jurist at least, though at present not so clearly from that of the index-maker or the practitioner.

A few words in conclusion.

1. It will be seen that the writer does not believe in that theory of Tort-right which makes it merely a right to recover compensation for a harm done. The theory here accepted is that of a right to have certain harmful results not produced; and, though the remedy (or means of realization of the right) is usually compensation and not specific prevention, that is a matter of remedial law and policy, and does not touch the nature of the substantive right-and-duty.

2. "False Representations" has not been made a title in the preceding exposition because the writer believes, with others, that it is, like some parts of Estoppel, akin in essence to the general subject of Undertakings (including contracts).

3. The writer expresses no opinion as to whether it is possible or desirable to follow the above order of topics in conducting instruction in Torts.

4. The effort has been in reaching the above results to proceed inductively. The writer will be glad to receive word of instances which seem not to harmonize with the analysis here set forth. The revision and correction of inductive results must always be necessary where there have been errors of analysis or omissions of significant instances, and it cannot be hoped that the above exposition is not subject to correction.

John H. Wigmore.

NORTHWESTERN UNIVERSITY LAW SCHOOL, Chicago.